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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10                   UNITED STATES OF AMERICA,  
11    Plaintiff,  
12    v.  
13                           CLAYTON ROUECHE,  
14    Defendant.

NO. CR07-344RSL

DEFENDANT'S MOTION TO STRIKE  
DECLARATION OF DANIEL LeCLERC  
OR FOR ALTERNATIVE RELIEF

NOTE ON MOTION CALENDAR:  
DECEMBER 11, 2009

15                   COMES NOW the Defendant Clayton Roueche, by and through his undersigned  
16                   counsel, and hereby moves to strike the Declaration of Daniel LeClerc that was submitted by  
17                   the Government's attorneys on or about October 27, 2009. This motion is made pursuant to  
18                   Criminal Sentencing Guideline § 6A1.3(a) and the Due Process Clause of the United States  
19                   Constitution. This motion is supported by the Declaration of Todd Maybrown in Support of  
20                   Motion to Strike Declaration of Daniel LeClerc.

22                   I.        FACTUAL BACKGROUND

23                   On April 28, 2009, Clay Roueche entered a guilty plea to Counts I, III and IV of the  
24                   Government's Superseding Indictment. Sentencing is currently scheduled for December 16,  
25                   2009 at 1:30 p.m. The defense anticipates that the Court may be called upon to resolve  
26                   significant legal issues and factual disputes relating to the upcoming sentencing proceeding.

*DEFENDANT'S MOTION TO STRIKE DECLARATION  
OR FOR ALTERNATIVE RELIEF- 1  
CR07-344RSL*

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1 Recently, on October 27, 2009, the Government submitted a declaration from an  
2 informant named Daniel LeClerc. Mr. LeClerc is currently in federal prison serving a ten-  
3 year sentence on account of his criminal conduct. He has already obtained a  
4 departure/variance for his “cooperation” with the case. Nevertheless, in submitting this new  
5 declaration, Mr. LeClerc is hoping to obtain an additional reduction of his sentence pursuant  
6 to Fed. R. Crim. P. 35(b). *See* Maybrown Dec. ¶ 2. He is represented by attorney Jon Zulauf.  
7

8 Defense counsel has informed the Government and Mr. LeClerc’s attorney of his  
9 concern that this witness has made false claims in his submission to the Court. In particular,  
10 counsel has indicated that Mr. LeClerc may have lied when he claims that he was intimidated,  
11 pressured or threatened by Clay Roueche. *See, e.g.*, LeClerc Dec. ¶¶ 10, 18, 37, 41.<sup>1</sup>  
12

13 In fact, it is defense counsel’s belief and understanding that Mr. LeClerc engaged in  
14 all of this conduct of his own free will. Mr. LeClerc was not a reluctant participant in this  
15 activity and he was never threatened by Mr. Roueche in any way. To the contrary, Mr.  
16 LeClerc was always a willing, if not enthusiastic, participant in this activity. It is defense  
17 counsel’s belief that Mr. LeClerc has manufactured these claims against Mr. Roueche in an  
18 attempt to justify his own conduct and to bolster his present claim for a reduction of sentence  
19 under Rule 35(b). *See* Maybrown Dec. ¶ 6.  
20

21 After reviewing Mr. LeClerc’s declaration, defense counsel contacted Jon Zulauf and  
22 requested an opportunity to meet with his client to discuss these matters. Mr. Zulauf  
23 subsequently informed me that Mr. LeClerc would not agree to meet with me to discuss any  
24 of these matters. *See* Maybrown Dec. ¶ 7.  
25  
26

1 Thereafter, defense counsel contacted AUSA Susan Roe to determine if the  
 2 Government might be able to facilitate a meeting between myself and Mr. LeClerc. Ms. Roe  
 3 indicated that she could not assist in arranging a meeting with Mr. LeClerc prior to the  
 4 sentencing. *See id.* ¶ 8.<sup>2</sup>

5 In light of all of these circumstances, defense counsel now moves this Court to strike  
 6 the Declaration of Daniel LeClerc. While the Court is free to consider reliable hearsay  
 7 information at sentencing, the defense maintains that this Court should not consider any of the  
 8 allegations of Mr. LeClerc. This declaration is rife with uncorroborated and presumptively  
 9 unreliable hearsay statements. Accordingly, as argued below, this Court should strike the  
 10 declaration and refuse to consider any of the allegations contained in that document.

## 12                   II.        DISCUSSION 13

### 14                   A. Legal Background

15 Under the regime of the Federal Sentencing Guidelines, the Court was free to consider  
 16 hearsay evidence at sentencing so long as that hearsay contained sufficient indicia of  
 17 trustworthiness. *See, e.g., United States v. Watts*, 519 U.S. 148, 154 (1997); *United States v.*  
 18 *Petty*, 982 F.2d 1365 (9<sup>th</sup> Cir. 1993), *as amended by* 992 F.2d 1015 (9th Cir. 1993), *cert.*  
 19 *denied*, 510 U.S. 1040 (1994); 18 U.S.C. § 3661; U.S.S.G. § 6A1.3(a). *See also* Fed. R. Crim.  
 20 P. 32(i)(3)(A) (stating that a sentencing court “may accept any undisputed portion of the  
 21 presentence report as a finding of fact”).

23  
 24                   <sup>1</sup> The Declaration includes a numerical anomaly. Mr. LeClerc signed the final page of the document  
 25 (number 11) which includes a “Verification” at Paragraph 40. The remainder of the declaration  
 includes a total of 41 numbered paragraphs.

26                   <sup>2</sup> Ms. Roe has indicated that the Government cannot force Mr. LeClerc to speak with defense counsel.  
 While counsel understands this position, the Government certainly could have notified Mr. LeClerc

1       The procedural protections the Guidelines afford defendants are minimal, and in some  
 2 cases, inadequate. For example, the Ninth Circuit has held that a heightened standard of proof  
 3 is required at sentencing where the court's determination may have a disproportionate impact  
 4 on the ultimate sentence. *See, e.g., United States v. Restrepo*, 946 F.2d 654, 661 (9<sup>th</sup> Cir.  
 5 1991) (*en banc*); *United States v. Valensia*, 222 F.3d 1173, 1182 (9<sup>th</sup> Cir. 2000). The Court  
 6 has also explained that a sentencing court should not consider hearsay evidence that is not  
 7 "corroborated by extrinsic evidence." *United States v. Ponce*, 51 F.3d 820, 828 (9<sup>th</sup> Cir.  
 8 1995). *See also United States v. Corral*, 172 F.3d 714, 715 (9<sup>th</sup> Cir. 1999); *United States v.*  
 9 *Kerr*, 876 F.2d 1440, 1446 (9<sup>th</sup> Cir. 1989).

10      The Supreme Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005), has  
 11 freed courts not only from the substantive mandates of the United States Sentencing  
 12 Guidelines – the compulsory enhancements, binding sentencing ranges, and so on – but also  
 13 its procedural dictates. Courts now enjoy the discretion to impose stronger procedural  
 14 protections at sentencing than the minimal standards dictated by the Guidelines. After  
 15 *Booker*, procedurally speaking, what is not forbidden is allowed.

16      The core procedural goals of sentencing should be fairness and accuracy. When years  
 17 of confinement ride on the court's factual findings, a high degree of confidence should be  
 18 attached to these findings. *See generally United States v. Dazey*, 403 F.3d 1147 (10<sup>th</sup> Cir.  
 19 2005). Thus, in appropriate circumstances, the courts should adopt more rigorous sentencing  
 20 procedures to ensure a fair and reliable proceeding.

21      **B. The LeClerc Declaration is Inherently Unreliable**

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 23  
 24 that the decision whether or not to file a Rule 35 motion might be impacted by his refusal to cooperate  
 25 with defense counsel.

1       Mr. LeClerc's declaration is highly unreliable – perhaps the most unreliable type of  
 2 hearsay that could be presented to this Court. *See, e.g., Bruton v. United States*, 391 U.S. 123  
 3 (1968); *Whelchel v. Washington*, 232 F.3d 1197, 1207-8 (9<sup>th</sup> Cir. 2000); *United States v.*  
 4 *Ortiz*, 993 F.2d 204 (9<sup>th</sup> Cir. 1993). As was explained by the Supreme Court in *Lee v. Illinois*,  
 5 476 U.S. 530 (1986):

6       [A] codefendant's confession is presumptively unreliable as to the passages  
 7 detailing the defendant's conduct or culpability because those passages may  
 8 well be the product of the codefendant's desire to shift or spread blame, curry  
 9 favor, avenge himself, or divert attention to another.

10      *Id.* at 545.

11      "It is or should be self-evident that the unverified story of an untested informant is  
 12 ordinarily unreliable." *People v. Maestes*, 204 Cal.App.2d 1208, 1220 (1988). Mr. LeClerc's  
 13 declaration includes the type of untested and uncorroborated hearsay that should not be  
 14 permitted at any sentencing proceeding. The Court should not consider the hearsay  
 15 statements of this obviously tainted and biased witness – particularly where this witness has  
 16 steadfastly refused to discuss any of these matters with defense counsel. For all of these  
 17 reasons, this Court should strike the declaration of Daniel LeClerc.  
 18

19      **C. The Defense is Hoping to Avoid a Paper Swearing Contest**

20      The defense is hoping to avoid a swearing contest – via conflicting affidavits –  
 21 regarding this witness. However, as necessary, the defense may attempt to present  
 22 documentary evidence which bears upon the credibility of Mr. LeClerc and his claims to this  
 23 Court.  
 24

25      Yet, many factors suggest that it would be unfair to force the defense "to prove a  
 26 negative" under these circumstances. Mr. LeClerc is a citizen of Canada and most of the

1 evidence relating to his exploits is in Canada and generally unavailable to the defense.  
 2 Moreover, Mr. LeClerc's refusal to cooperate has limited defense counsel's ability to obtain  
 3 information that may be relevant to this Court. *See Maybrown Dec.* ¶¶ 7-12. To avoid an  
 4 unfair swearing contest, the Court should strike the declaration of this witness.  
 5

6 **D. In the Alternative, the Court Should Afford Additional Relief**

7 **1. The Need for Cross-Examination**

8 Ever since trials have been reported, cross-examination has been featured as a vital  
 9 portion of the proceedings. Socrates, while representing himself against his accuser, Miletus,  
 10 is said by Plato to have cross-examined him long and well.

11 Professor Wigmore has explained:

12 For the two centuries past, the policy of the Anglo-American system of  
 13 evidence has been to regard the necessity of testing by cross-examination, the  
 14 "truth" of direct examination as a essential portion of the trial. Not even the  
 15 abuses, the misunderstandings, and the puerilities which are often found  
 16 associated with cross-examinations have availed to nullify its value. It may be  
 17 that in more than one sense, it takes the place of our system which torture  
 occupied in the medieval system of the civilians. Nevertheless, **it is beyond**  
**any doubt the greatest legal engine ever invented for the discovery of the**  
**truth.**

18 Wigmore Evidence § 1367.<sup>3</sup>

19 The right to confront and cross-examine adverse witnesses is guaranteed by both the  
 20 federal and state constitutions. *See State v. Darden*, 145 Wn.2d 612, 620 (2002). As the  
 21 Court explained:

22 The primary and most important component is the right to conduct a  
 23 meaningful cross-examination of adverse witnesses. *State v. Foster*, 135  
 24 Wn.2d 441, 455-56 (1998). The purpose is to test the perception, memory, and  
 25 credibility of witnesses. *State v. Parris*, 98 Wn.2d 140, 144 (1982); *State v.*

26 <sup>3</sup> This particular quotation was cited with approval by the United States Supreme Court in *California*  
*v. Green*, 399 U.S. 149, 158 (1970).

1           *Roberts*, 25 Wn.App. 830, 834 (1980). Confrontation therefore helps assure  
 2 the accuracy of the fact-finding process. *Chambers v. Mississippi*, 410 U.S.  
 3 284, 295 (1973). Whenever the right to confront is denied, the ultimate  
 4 integrity of this fact-finding process is called into question. *Id.* As such, the  
 right to confront must be zealously guarded. *State v. Kilgore*, 107 Wn.App.  
 160, 184-85 (2001).

5           *Id.* “Any fact which goes to trustworthiness of the witness may be elicited if it is germane to  
 6 the issue.” *State v. Wilson*, 60 Wn.App. 887, 893 (1991).

7           To date, most courts have concluded that the Supreme Court’s decision in *Crawford v.*  
 8 *Washington*, 541 U.S. 36 (2004), does not apply during sentencing proceedings. *See, e.g.*,  
 9 *United States v. Littlesun*, 444 F.3d 1196, 1199-1200 (9<sup>th</sup> Cir. 2006) (“[H]earsay is  
 10 admissible at sentencing, so long as it is accompanied by some minimal indicia of  
 11 reliability.”). However, if the Court is to entertain any of the unreliable allegations contained  
 12 within the LeClerc declaration, it should allow the defense an opportunity to confront and  
 13 cross-examine this tainted witness.

15           **2. Waiver of the Attorney-Client Privilege**

16           Mr. LeClerc has chosen to voluntarily reveal information about an alleged contact  
 17 with an attorney from the State of California. *See* LeClerc Dec. ¶ 41. In doing so, he has  
 18 attempted to suggest that this attorney (a) is somehow connected with Mr. Roueche and (b)  
 19 has threatened Mr. LeClerc in an attempt to ensure that he would not cooperate with the  
 20 Government’s investigation. The defense believes that these suggestions – and Mr. LeClerc’s  
 21 allegations – are untrue.

22           After reviewing this information, defense counsel contacted the attorney in California  
 23 in an attempt to verify – or refute – Mr. LeClerc’s allegations. That attorney stated that he  
 24 would not be able to discuss these issues unless it was clear that Mr. LeClerc had waived his  
 25  
 26

1 attorney-client privilege as to these same matters. The attorney also asked for an opportunity  
2 to review the witness' declaration and, to facilitate this process, he has stated that he would  
3 agree to abide by any protective order that may be imposed by the Court. *See Maybrown*  
4 Dec. ¶ 11.

5 It is clear that Mr. LeClerc has chosen to waive the attorney-client privilege as to any  
6 conversations he had with the attorney in California. *See, e.g., Bittaker v. Woodward*, 331  
7 F.3d 715 (9<sup>th</sup> Cir. 2003) (*en banc*); *United States v. Amlani*, 169 F.3d 1189, 1195 (9<sup>th</sup> Cir.  
8 1999); *United States v. Jeffers*, 520 F.2d 1256, 1265 (7<sup>th</sup> Cir. 1975). Accordingly, the defense  
9 asks this Court to issue a ruling that Mr. LeClerc has made such a waiver so that Mr. Roueche  
10 may have an opportunity to refute the allegations contained in this declaration. The Court  
11 should also rule that the California attorney shall be permitted to review the LeClerc  
12 declaration subject to a protective order.

13  
14 DATED this 3<sup>rd</sup> day of December, 2009.

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18 TODD MAYBROWN, WSBA #18557  
19 Attorney for Defendant Roueche  
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1                   **CERTIFICATE OF SERVICE**

2                   I hereby certify that on December 3, 2009, I electronically filed the foregoing paper  
3 with the Clerk of the Court using the ECF system which will send notification of such filing  
4 to the attorneys of record for the Government and the defendants.

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7  
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